Supreme Court, U.S.
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No. ——— OFFICE OF THE CLERK

In The

Supreme Court of the United States

JACK FINCH,

Petitioner,

vs.

BOB'S DISTRIBUTING COMPANY, INC., DEFINED BENEFIT PLAN; BOB'S DISTRIBUTING COMPANY, INC., STANLEY J. THOMSON; BOB'S DISTRIBUTING CO., INC., DEFINED BENEFIT PLAN FIDUCIARIES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

RANDALL G. SIMPSON
Counsel of Record for Petitioner
JERMAIN, DUNNAGAN & OWENS, P.C.
3000 A Street, Suite 300
Anchorage, Alaska 99503
(907) 563-8844

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Under ERISA, a defined benefit pension plan is required to give 15 days advance written notice to participants before any significant reduction of benefits. Bob's Pension Plan did not give the ERISA required notice before implementing Plan Amendment No. 2 that significantly reduced the rate of benefit accrual to all participants. Must Plan participant Finch show evidence of some additional prejudice before the reduction of benefits is declared void and inoperative?

2. ERISA prohibits a retroactive "cut back" in accrued or already earned pension benefits. Bob's Plan Amendment No. 2 was adopted December 21, 1993, and on its face the effective date of Plan Amendment No. 2 was January 1, 1993. The Amendment No. 2 significantly reduced benefit accrual. Could Bob's Plan actuary "save" this illegal retroactive reduction of accrued benefits by interpreting a later effective date for the amendment?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Jack Finch is the only named participant of Bob's Distributing Company Defined Benefit Pension Plan (Bob's Pension Plan) identified in the case. All other participants of Bob's Pension Plan would benefit from an increased pension benefit by the determination that Plan Amendment No. 2 reduction in the rate of benefit accrual is void because it violates ERISA. Petitioner does not have access to the names of all participants who would have an interest in Bob's Pension Plan.

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JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on September 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1996).

STATUTORY PROVISIONS INVOLVED

Sections 1054(g) and (h) of Title 29 of the United States Code provide as follows:

> (g) Decrease of accrued benefits through amendment of plan.
>
> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of

the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of –

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In this case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

(3) For purposes of this subsection, any –

(A) tax credit employee stock ownership plan (as defined in section 409(a) of Title 26), or

(B) employee stock ownership plan (as defined in section 4957(e)(7) of Title 26), shall not be treated as failing to meet the requirements of this subsection merely because it modifies distribution options in a nondiscriminatory manner.

(h) Notice of significant reduction in benefit accruals.

(1) A plan described in paragraph (2) may not be amended so as to provide for a significant

reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to –

(A) each participant in the plan,

(B) each beneficiary who is an alternate payee (within the meaning of section 1056(d)(3)(K) of this title) under an applicable qualified domestic relations order (within the meaning of section 1056(d)(3)(B)(i) of this title), and

(C) each employee organization representing participants in the plan, except that such notice shall instead be provided to a person designated, in writing, to receive such notice on behalf of any person referred to in subparagraph (A), (B), or (C).

(2) A plan is described in this paragraph if such plan is –

(A) a defined benefit plan, or

(B) an individual account plan which is subject to the funding standards of section 1082 of this title.

29 U.S.C. § 1132(g)(1) provides as follows:

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. § 1135 provides as follows:

> Regulations
>
> Subject to subchapter II of this chapter and section 1029 of this title, the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter. Among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records (subject to section 1134(a) and (b) of this title).

STATEMENT OF THE CASE

A. Introduction

Finch, as an aggrieved participant of Bob's Pension Plan, brought this action to require the Plan administrator, Bob's, and its trustee Thomson to pay attention to a woefully mismanaged pension plan. The focus of his complaint was the improper adoption of Bob's Pension Plan Amendment No. 2 that drastically reduced the benefit accrual for him and other participants.

Despite convincing evidence of repeated violation of ERISA, Bob's and Thomson were absolved of any liability because of Finch's failure to show any prejudice or harm. App. 2a. The District Court found that the case presented a "wrong without a remedy" because of the eventual repayment of all amounts owed to the Plan plus interest. App. 26a. Ironically, the amount of these repayments plus interest required to be made to the Plan were significantly

reduced because of the application of Plan Amendment No. 2 – an amendment to the Plan that the court concluded had been adopted in violation of ERISA.

This case requires intervention by this Court to declare that a pension plan cannot use amendments adopted in violation of ERISA to reduce funding liabilities and then use the payoff of these reduced liabilities to immunize itself from the initial wrongful conduct. This Court also needs to speak in clear and unambiguous terms that ERISA proscriptions requiring 15 day advance written notice of any significant reduction in benefit accruals means that a participant need not show any additional evidence of harm. The lack of notice is harm enough. This clear statement is required to forestall the Ninth Circuit Court of Appeals from balancing the equities in reviewing the relative "harm" caused by failure of a pension plan to comply with the statutory mandate of 15 days advance written notice as required by ERISA, § 204, 29 U.S.C. § 1054(h).

This Court also needs to declare that a plan amendment is interpreted as written. An amendment that violates the ERISA "no cutback" rule cannot be "saved" by either a Plan administrator or a Plan actuary interpretation. The decisions below allowed the Plan administrator to construe a later but unwritten effective date to avoid an illegal cutback of benefits. App. 2a. If Plan actuaries can "save" poorly drafted amendments or amendments that on their face violate ERISA, then there is no need for a written plan document to ever be in compliance with ERISA. Any plan document, no matter how faulty, can be construed and operated in compliance with ERISA regardless of what it "says." Therefore, the Court should

use this case to declare that the correct remedy for defective language of an amendment that is illegal on its face is that the amendment itself is void. Only this remedy preserves the purpose of ERISA to base pension benefit promises on a written plan.

This case has far-reaching impact. This conflict affects and impacts all other participants of Bob's Pension Plan. The case also raises serious issues concerning the proper administration procedures for all pension plans and participants in America. ERISA sets the minimum requirements for all pension plans, big or small. This Court should hold to task even the unsophisticated or inattentive plan administrators of small pension plans. The rules of ERISA must apply equally to the unsophisticated as well as the large professionally administered pension plans. Otherwise, ERISA's reach and protection of small, single-employer pension plans (such as Bob's Pension Plan) is compromised. Finally, this Court should instruct the federal courts that violations of ERISA are serious wrongs that require finding a remedy.

B. Statement of Facts

Bob's was a bread and bakery products distributor in Alaska from 1974 through 1997. Thomson was president and sole stockholder of Bob's. Thomson was also sole trustee of Bob's Pension Plan. Bob's was the administrator and sponsor of the Plan. App. 7a-8a.

The Plan "schedule of benefits" was originally developed through the Equitable Insurance Company. It was an ERISA defined benefit pension plan. The original Plan documents were executed on July 30, 1991 and the first

Plan Year was January 1, 1990 to December 31, 1990. App. 9a. Bob's made an initial funding payment to the Plan for the 1990 Plan Year. But Bob's failed to make minimum funding contributions for Plan Years 1991, 1992, 1993, 1994 and 1995. *Id.* and App. 35a., n.11

Faced with the annual financial contributions needed to meet the promised retirement benefits and to make up five years of missing funding contributions required of a defined benefit plan, Bob's and Thomson considered and subsequently took the initial steps toward terminating Bob's Pension Plan. App. 10a. Indeed, the first notice to Plan participants and employees of Bob's that there was a Defined Benefit Pension Plan was Bob's notice of the termination of the Plan distributed in the timeframe of March 2, 1993 and May 24, 1993. App. 10a.

In the fall of 1993, in lieu of Plan termination, Thomson and Bob's decided to minimize and reduce the size of the funding requirements by amending the Plan to reduce accruals to the minimum amount allowed by law. This decision may have been motivated in part on the knowledge that termination would require full funding at the unreduced benefit levels, Thus, Amendment No. 2 was adopted and signed by Thomson as president of Bob's on December 21, 1993. *Id.*

There was a problem in drafting of the amendment. The stated effective date of Amendment No. 2 was January 1, 1993. The court specifically found that: "The effective date by the terms of Amendment No. 2 was January 1, 1993." *Id* at 10a-11a. Therefore, on its face, the amendment retroactively reduced the rate of accrued benefits for Plan participants for the entire 1993 Plan Year. This

would be a cutback in accrued benefit on the face of the amendment.

Plan Amendment No. 2 was drafted by Plan attorney Speed in consultation with Plan actuary Cargill. App. 11a. Acknowledging that the amendment was poorly written and discussing how he might have better written the amendment, Speed stated: "Well, I certainly would have put the correct date on it, you know, to tie in with what we were actually doing with the plan." CR 58-1, Ex. 3, Speed Dep. at 17.

Plan participants did not receive actual notice of Amendment No. 2 until at the earliest January 1994. App. 10a-11a. This was after the adoption date of the Amendment, and even assuming an effective date at its adoption on December 21, 1993, the notice was still not within the statutory 15 day notice period required by 29 U.S.C. § 1054(h). After the adoption of Amendment No. 2, the Plan actuary realized that the amendment was defective as a retroactive reduction of already accrued benefits. So, on May 3, 1994, he had the Plan trustee, Thomson, execute a "Statement of Election" to attempt to clarify and interpret that the illegal retroactive effective date of January 1, 1993 must be construed to apply for funding purposes only. App. 30a, n.10. The Plan actuary assumed an effective date of December 31, 1993, even though this still would be an effective date before any § 1054(h) notice was given to participants. App. 31a, end of n.10.

C. Course of Proceedings

On September 18, 1995 participant Jack Finch filed his complaint seeking redress for the multiple violations

of ERISA including the prohibited cutback of accrued benefits by Plan Amendment No. 2. He also sought a declaration that Plan Amendment No. 2 was void and inoperative because of its significant reduction of future benefits without the required written 15 days advance notice. On the basis of largely undisputed facts, cross-motions for partial summary judgment were filed. App. 6a-7a.

A tentative order was issued by the court finding that there was convincing evidence of multiple violations of ERISA. App. 26a. The order also found separate breaches of fiduciary duty by Thomson as Trustee. Additionally, the court found that the Plan actuary and Plan trustee could construe and interpret Amendment No. 2 to save it from its illegal cutback in accrued benefits back to January 1, 1993. App. 29a-30a. The court also determined that Amendment No. 2 was adopted in violation of § 1054(h). App. 32a. But, the court ruled Finch was not entitled to any remedy because he could demonstrate no harm nor prejudice resulting from the lack of fifteen day advance notice. App. 33a.

The Ninth Circuit on appeal and in an unpublished decision affirmed the determination of the district court that the Plan administrator had the authority to "reconcile the inconsistencies" and thereby save Plan Amendment No. 2 from the "no cutback" rule. App. 2a. Additionally, the Ninth Circuit affirmed the district court's finding that the Plan Amendment No. 2 violated the advance notice requirements of 29 U.S.C. § 1054(h). The court also agreed that the lack of prejudice and harm to Finch would make it inequitable to order any recovery for Finch and the other participants of Bob's Pension Plan

by voiding the benefit reductions of Amendment No. 2. *Id.*

REASONS FOR GRANTING THE WRIT

A. This Court Should Provide a Clear Statement that ERISA Does Provide a Remedy for Violations of ERISA.

This case stands ERISA on its head. Congress passed ERISA to promote the goal of assuring that promised pension benefits would be maintained and exist for an employee upon reaching retirement. ERISA was enacted to ensure that employees will not be left empty handed once employers have guaranteed them certain benefits. *Lockheed v. Spink*, 517 U.S. 882 (1996). As described in *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999), a defined benefit plan is a distinct and singular form of pension. It is a type of pension plan where, as the name implies, an employee upon retirement is entitled to a fixed periodic pension payment at a fixed promised level of benefit. *Id.* at 761. As the court in *Hughes Aircraft* stated, "members have a right to a certain defined level of benefits known as 'accrued benefits.' " *Id.*

To maximize the chances of an employer honoring those commitments, Congress required that employee benefit plans, specifically defined benefit plans, do certain things without fail. First, Congress required employers sponsoring these defined benefit plans to establish and maintain those pension plans pursuant to written instruments. In addition, Congress required

employers sponsoring defined benefit plans to meet statutory minimum annual funding obligations. *Id.* Congress also required employers to give prompt notice of failure to fund benefits or any reductions in benefits. The undisputed facts in this case establish that Bob's did none of these things.

The court below specifically found that "Finch has presented convincing evidence (indeed mostly undisputed evidence) that Bob's repeatedly violated ERISA's notice and disclosure provisions." App. 34a. The court determined that Bob's failed to make annual minimum funding contributions to the Plan and then failed to give notice to participants of this failure – all required by ERISA. App. 9a and 35a, n.11. The court also found trustee Thomson guilty of breaches of his fiduciary duty and held:

> . . . [t]hat Thomson breached his fiduciary duties by failing to insure that timely payments were made to the Plan, or in the alternative, breached his fiduciary duties by failing to notify Plan participants of his Plan's funding deficiencies."

App. at 26a.

The court also held " . . . as a matter of law that Amendment No. 2 was adopted in violation of 29 U.S.C. § 1054(h)." App. at 33a-34a. Unbelievably, despite these legal conclusions finding ERISA violations, the court stated: "However, this seems to be a wrong without a remedy [because] Thomson and Bob's eventually made up all of the payments to the Plan plus interest." *Id.* The appropriateness of such a conclusion aside, it is also not logical. The eventual payments plus interest were made

by Thomson and Bob's only after Finch filed his lawsuit. By then, the amount owed was less because of the reduced formula for accrual of benefits that was accomplished by the amendment " . . . adopted in violation of 29 U.S.C. § 1054(h)."

This Court should declare that these wrongs in violation of ERISA require a remedy. Regardless of the efforts of the Plan sponsor to try and make the pot right, failure to meet funding minimums and the resulting failure to give § 1054(h) notice to reduce benefit accrual cannot be brushed aside as *de minimus*. App. 34a.

In this case, it was undisputed that not long after the start up of Bob's Pension Plan, Cargill, the Plan actuary, reviewed the Plan census information. He expressed concern that the ultimate pay out to Thomson would likely be much less than the $855,999.00 that was given to Thomson by Equitable Insurance Company when it sold him its defined benefit plan. (CR 58-2, Ex. 12 at 2; Ex. 13; Cargill Depo. at 14-16.) Cargill correctly suspected that Thomson might have been misinformed about his potential retirement benefit. He advised that any such misunderstanding should be corrected to avoid what he predicted would be a "disappointing surprise to the *key participant*." (CR 58-12, Ex. 12 at 2.) The "key participant" was Thomson.

The Plan actuary, Cargill, also testified that he was frustrated with the mistreatment of the Plan design and its amendments by Bob's and Thomson. (CR 58-2, Ex. 13, Cargill Depo at 46-47.) The level of his frustration was, in part, attributable to the changing objectives passed along to him from Bob's regarding amendment to Plan design.

(CR 58-2, Ex. 13, Cargill Depo at 45.) One of the major objectives of Bob's and Thomson seemed to be: " . . . the anticipated benefits to be paid to Mr. Thomson." *Id.*

ERISA was designed to promote and preserve the rights and interests of all employees and their beneficiaries. ERISA was not passed to protect the rights and interests of the "key participant." ERISA imposes obligations on pension plans to operate them from written plan documents. *See Hamilton v. Air Jamaica Ltd.*, 945 F.2d 74, 77 (3rd Cir. 1991) *cert. den.* 503 U.S. 938 (1992), and *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).

The decisions below allowed Bob's Plan administrator and Cargill, the Plan actuary, to ignore the written language of the Plan amendment to avoid liability and maximize benefits for Thomson. Instead of affirming ERISA principles, the decisions below undermine and upturn the purposes of ERISA. ERISA was not designed to provide for easy ways for employers to get out of their minimum funding requirements. ERISA was not designed to allow employers a method for a quick fix to reduce their obligation to fund a defined benefit plan once the employer finds out that the defined pension plan benefits were going to cost too much.

In this case, instead of preserving and protecting the promised benefits for Finch and other Bob's Pension Plan participants, the court decisions below interpret ERISA to absolve Bob's and Thomson of their repeated failure to fund and amend the Plan properly. As discussed in *Curtiss-Wright Corp.*, Finch was only trying to prove, and did prove, that an unfavorable plan amendment was not properly adopted. ERISA should neither obstruct nor

facilitate his efforts. *Id.* Instead, the court decisions below obstructed his effort as "inequitable." The Ninth Circuit invoked the principles of ERISA to protect Bob's and Thomson from their blatant and repeated failure to follow ERISA. This is precisely the opposite of what Congress intended by enacting ERISA. This Court should intervene to rectify this wrong and confirm that violations of ERISA require a remedy.

B. There is a Disturbing Reliance on a Review of the Equities in Different and Conflicting Circuit Court of Appeal Decisions Addressing ERISA Requirements of § 1054(h) Notice.

There are differing approaches that have been taken by several circuits of the federal courts of appeal reviewing § 1054(h) notice requirements. The Seventh Circuit has stated unequivocally that any failure to provide 15 day advance notice required by § 1054(h) is a "simple case." The failure voids the amendment.

Under the decision of the Ninth Circuit here, the court apparently did not see the statutory mandate so clearly. It ruled that voiding the amendment and allowing a remedy to Finch in unreduced benefits would be inequitable. The Eleventh, like the Ninth Circuit, has used a balancing of the equities test in determination of whether a remedy is justified when inadequate notice was provided.

1. Seventh Circuit View

The Seventh Circuit in *Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1403 (7th Cir. 1992), determined that *Roadmaster's* notice of plan amendments to employees had violated § 1054(h). The court stated that this failure presented the court with a simple case. The court ruled that the notice was " . . . precisely the opposite of what § 204(h) requires."[1] *Id.* at 1403. As a result of the defective § 1054(h) notice, the court stated that:

> § 204(h)'s language is also clear and imperative: A plan 'may not be amended' absent proper notice. *Roadmaster's* violations of §§ 204(g) and (h) rendered the June 27 amendment ineffective.

Id. at 1404.

The Seventh Circuit in *Roadmaster* was disinclined to consider any equitable arguments. The court was unswayed by excuses of business efficiency or the plan sponsor's reliance on the Union to get the word out or equitable considerations of a cost/benefit analysis. The Seventh Circuit saw only the clear statutory mandate and the court stated: "Whatever one thinks of *Roadmaster's* assumption about Congress's intent . . . the problem is that *Roadmaster's* argument bears no relation to § 204(h)'s actual language." *Id.* at 1406.

In *Davidson v. Canteen Corp.*, 957 F.2d 1404 (7th Cir. 1992) the Seventh Circuit refused to look beyond the clear and unambiguous words of the statute. The court stated that it did not need to reach arguments about the legislative history of the statute or notices of the IRS or the

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[1] ERISA §204(h) is 29 U.S.C. §1054(h).

purported absurdity of the result. The court did not see that such arguments would excuse the plan's failure to provide the required advance notice of § 1054(h). The court stated:

> *Canteen* asked that we look beyond the statute itself – to the legislative history, notices of the IRS, set case law, and the absurdity of the result on this case – for an answer in its favor. Because the statute . . . is clear and unambiguous, we need not reach so far for help in construing it.

Id. at 1408.

But, *in dicta* the court in *Canteen Corp.*, discussed the employer's equitable arguments.[2] Addressing the employer's contention that voiding the statute would lead to an "absurd result," the court reasoned that the result was not absurd recognizing that advance notice " . . . would have allowed [the participants] to prevent injury from the amendment." *Id.* at 1409. But, the Seventh Circuit, unlike the Ninth Circuit in the case at bar, reasoned that Congress must have weighed the burden of the required notice being placed on Plan sponsors and chose to counterbalance that burden to provide notice against the "significant" future benefit reductions. *Id.* Unlike the Ninth Circuit, the court, in *Canteen*, did not let

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[2] The court first noted that Congress had purposely expanded the notice provisions of §1054(h) beyond the initial limitation of notice to those amendments which either froze or terminated certain plans. *Id.* citing H.R. 3500, 99th Cong. 1st Sess. 131, Cong. Rec. 28779-80 (1985).

any consideration of whether a recovery would be inequitable or absurd to overrule the mandate of the clear and unambiguous words of § 1054(h).

2. Eleventh Circuit View

The Eleventh Circuit Court of Appeals in *Scott v. Admin. Committee of the Allstate Agents*, 113 F.3d 1193 (11th Cir. 1997) engaged in an equitable analysis of the "fairness" or "absurdity" of invalidating an amendment which did not meet the notice requirements of § 1054(h). In this case, under Rev. Procedure 86-65, Plan sponsors of pension plans were allowed to extend suspension of benefit accruals until the end of 1990 without § 204(h) notices. Although appropriate notices were given of suspension of benefits to 1989, no notice was or could be given for subsequent or later reduction of benefits until after receipt of IRS guidelines. The court reasoned that any failure of advance notice occurred through no "fault" of the Plan sponsor. The court was therefore loathe to require the Plan sponsor to do the "impossible." *Id.* at 1200.

3. Ninth Circuit View

The Eleventh Circuit, in *Scott v. Admin. Committee of the Allstate Agents*, 113 F.3d 1193, 1201, n.23 (11th Cir. 1997) cited as persuasive the reasoning set forth in an unpublished Ninth Circuit decision. *Allied v. First Nationwide Financial Corp.*, 97 F.3d 1458 (Table), (9th Cir. 1996). *Id.* at 1201 n.23. In *Allied v. First Nationwide Financial*

Corp., the Ninth Circuit excused a plan sponsor's defective § 1054(h) notice by finding that any failure to communicate an adequate notice to the participants could be laid at the feet of the IRS. It was " . . . not the fault of the Plan." *Id.* Thus, although unpublished, the Ninth Circuit decisions applying equity to § 1054(h) analysis appear to have persuasive power.

Just so in *Finch v. Bob's Distributing Co. Defined Benefit Plan, et. al.*, the case at bar, the Ninth Circuit also in an unpublished decision, has balanced the equities to relieve a Plan Sponsor of the consequences of a notice of Amendment No. 2 that violated ERISA, § 1054(h). The Ninth Circuit has demonstrated, at least in these two unpublished decisions, it will balance the equities in deciding to invalidate an amendment that fails to meet the clear mandate of § 1054(h). If any recovery to a plan participant would be "inequitable" either because there was no fault on the part of the plan sponsor or because the participant could show no harm from the lack of notice, then the Ninth Circuit will not invalidate the amendment. The decision of the Ninth Circuit Court to deny Finch any recovery for Bob's failure to provide § 1054(h) notice because it would be inequitable is directly at odds with the analysis employed by the Seventh Circuit.

4. If ERISA Mandates are Construed on the Basis of Equity, the Purpose and Strength of ERISA is Diluted.

The Ninth and Eleventh Circuits have incorporated principles of equity in their analysis of the simple and

clear statutory mandate of § 1054(h). The Seventh Circuit decisions follow the simple mandate of the statute without regard to fairness arguments, efficiency arguments or arguments that the result of invalidating the amendment is absurd.[3]

This Court should intervene to confirm the approach of the Seventh Circuit. Especially so since the Ninth Circuit unpublished decisions employing an equitable analysis are being relied upon as persuasive.

Congress did not say that defined benefit plans should provide 15 day written notice to participants, if at all possible. Congress did not say that if there was no fault on the part of the plan sponsor or if no participant was harmed by the lack of notice, then the plan may be amended absent proper notice. Congress said that a plan may *not* be amended absent proper notice. This Court should give guidance to the federal courts that ERISA does not require that a participant, such as Finch, show

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[3] Other circuit court of appeal decisions addressing §1054(h) are: *Anderson v. Resolution Trust Corp.*, 66 F.3d 956 (8th Cir. 1995) (held RTC amendments of pension plan did not fall within the scope of §204(h) and were excused by IRS regulation, *Id.* at 959); *Johnson v. St. Francis Xavier Cabrion Hospital of Seattle*, 910 F.2d 594 (9th Cir. 1990) (held that remand was necessary to resolve conflicting allegations as to the statute, effective date of the amendment in relation to the effective date of §1054(h). *Id.* at 597); there are also several federal district court cases that have construed the consequences of failure to notice plan amendments under §1054(h): *DiCioccio v. Duquesne Light Co.*, 911 F.Supp. 880 (W.D. Pa. 1995); *Koeing v. Intercontinental Life Corp.*, 880 F.Supp. 372, 374 (E.D. Pa. 1995); *Pickering v. USX Corp*, 809 F. Supp. 1501, 1502 (D. Utah 1992).

some harm or prejudice from an improperly noticed amendment.

Moreover, the Eleventh and Ninth Circuits' reliance on equity when construing ERISA § 1054(h) is quite dangerous. Where will the protections of the minimum standards set by ERISA next be compromised by an equity analysis? This Court should act to limit this insidious tendency by these federal circuit courts of appeal to construe violations of ERISA on the basis of harm or fault.

There was no need for the Ninth Circuit to engage in the analysis of whether voiding Bob's Amendment No. 2 and thereby permitting the recovery of additional pension benefits by Finch would be inequitable. There was no doubt that Amendment No. 2 was adopted without notice required by § 1054(h). There was no doubt that this Amendment significantly reduced benefit accruals for each and every employee of Bob's. Finch and all employees of Bob's received a smaller pension benefit than he or she was originally promised. Thus, § 1054(h) states the Plan may not be amended. The Ninth Circuit was just flat wrong to act in contravention of the simple and straightforward language of the statute.

This Court should exercise its discretion to intervene and lessen any impact required by the Ninth Circuit's use of unpublished decisions. Also, this decision should be reversed to conform to the correct analysis used by the Seventh Circuit.

C. This Court Should Intervene to Confirm the Important Issue That Plan Administrators and Plan Actuaries Cannot "Save" Illegal Plan Amendments By An Interpretation At Odds With the Unambiguous Terms of the Plan Amendment

As the court decision below noted, the plan attorney, Speed, who inartfully drafted Plan Amendment No. 2 and the Plan actuary, Cargill, were both fully aware of the anti-cut back rule of ERISA § 1054(g). App. 29a-30a. After Plan Amendment No. 2 was executed on December 21, 1993, and sent to participants, the Plan actuary realized the mistake. Finch had previously, in an unrelated action, sued the Plan for "failure to properly fund and manage the Plan." App. 10a. The Plan actuary and Plan attorney did not want to alert Finch and other employees of Bob's to another problem in the Plan administration. Instead, the Plan actuary prepared a "statement of election" that revised the retroactive effective date of Amendment No. 2 so that it would not reduce accrued benefits prior to the amendment's adoption date. CR 55, Ex. F, p. 2, App. 30a, n.10.[4]

Plan Actuary Cargill admitted that he applied the amendment retroactively in some respects. He computed each participant's accrued benefits under the reduced formula even for the 1993 Plan Year. He also calculated the Plan liabilities on Form 5500 for Plan Year 1993 under

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[4] Cargill acknowledged, and the district court recognized, that even with an effective date of December 31, 1993, Amendment No. 2 still violated the advance notice requirements of ERISA §1054(h). App. 32a. Notice was not sent to Finch until, at least, his first paycheck in January, 1994.

the "normal retirement benefit" reduced to 2% as stated in Amendment No. 2. CR 55, Ex. G at p. 3. But, Cargill then saved the amendment from the no cutback rule by using his own personal "saving" formula found nowhere in the Plan Amendment, nowhere in the Plan Document and nowhere in the Notice to Plan Participants. App. 31a, n.10. Even though no actual payment for 1993 accrued benefits was reduced, the amendment was used to limit or reduce Thomson and Bob's overall funding obligations.

Interestingly, Cargill never explained how or why he picked December 31, 1993 as the effective date for Amendment No. 2. It was the end of a Plan year and it was 10 days after adoption of the amendment. But, the district court recognized that since notices didn't go out until sometime in January 1994, the December 31, 1993 effective date still did not meet § 1054(h) requirements. App. 32a. Thus, the amounts of moneys received by each participant in the future was less. More importantly, the amount required for repayment to the Plan plus interest by Bob's and Thomson was significantly reduced.

Finally, Bob's notice did not comport with the standards set by recent IRS regulations on ERISA § 204(h) notice.[5] 63 Fed. Reg. 239 (Dec. 14, 1998). In this case, the Plan actuary and Plan administrator picked an "effective date," December 31, 1993, for the reduction of benefits

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[5] These regulations require advance notice to include the effective date of the amendment. Notice of these regulations were provided to the Ninth Circuit panel as additional authority prior to oral argument. But the decision fails to address the impact of this regulation.

that suited their purposes. It was a date set forth nowhere in Plan documents nor in the Plan Amendment. This was probably because it was not picked by the actuary until he discovered the problem and drafted the "statement of election" in May 1994.

The Ninth Circuit, without discussion, allowed the Plan administrator with the Plan actuary to "elect" and to pick this date as the effective date they wanted. By this means, they could interpret away any anti-cutback reduction required by the unambiguous terms of Amendment No. 2. By the Plan actuary and Plan administrator's "interpretation" the amendment was "saved" from clear violation of § 1054(g).

Finch, as well as all participants of Bob's, had a right to rely on the Plan documents, as written, to determine exactly what his benefit and rights were under the Plan. Instead, the Ninth Circuit by a grant of unfettered discretion to "reconcile inconsistencies" in the Plan avoided the clear writing of the amendment. This is a novel and dangerous theory in light of ERISA's requirement of written plan documents. The Ninth Circuit, in an unpublished decision, with little reasoning, has determined that ERISA experts operating a pension plan who are clearly aware of the ERISA anti-cutback rule and who could not ever intend to violate ERISA because they know such violation would be unlawful must be allowed to construe away clear violations of ERISA.

The Ninth Circuit in an unreasoned and unsupported affirmation of this novel and dangerous approach to ERISA merely states that:

> Section 2.6 of the benefits plan empowers the administrator of the plan with the authority to 'determine all questions arising in connection with the administration, interpretation and application of the plan.' *This includes the authority to reconcile any inconsistency within the plan.* In this case the administrator reasonably reasonably (sic) construed Amendment Two so as to comply with both the statute and the Plan.

App. 2a. (Emphasis added.) This is legal double-speak. More importantly, it is also dangerous reasoning. It means that so long as any pension plan employs a "reputable" expert actuary or a knowledgeable attorney, plan documents written in clear violation of ERISA do not matter. This cannot be the law of ERISA.

This insidious principle, even if it is only enunciated in an unpublished Ninth Circuit decision, should not stand. Although not disseminated widely, Plan Actuary Cargill is executive vice president of National Actuarial Pension Services, Inc., a nationwide actuary firm. He is also a fellow of Society of Actuaries and member of the American Academy of Actuaries. (Cargill Depo., p. 2). Attorney Marvin Speed is an attorney in Mississippi and is a plan attorney for many small pension plans. In this case an Equitable agent in Alaska contacted him to advise an Alaska employer, Bob's from his office in Mississippi. They all know about the Ninth Circuit's unpublished decision. The disturbing and dangerous principles enunciated by the Ninth Circuit even in this unpublished decision should not be left undisturbed.

This Court should resolve this grave and serious undermining of the statutory purposes of ERISA. ERISA

is sometimes difficult to parse. Small pension plans in out-of-the-way places may sometimes have difficulty understanding and meeting all the requirements. But this case demonstrates how far off track some plan administrators and sponsors can get. This Court should affirm that employees and their beneficiaries can rely on the written pension plan instruments no matter the level of sophistication of the plan sponsors. This Court should also review and reverse the concept enunciated by the Ninth Circuit that a Plan administrator can avoid a Plan amendment's clear violation of ERISA by the administrator's "authority to reconcile any inconsistency with the plan." App. 2a.

CONCLUSION

It is undisputed in the record, that the only participant of Bob's Pension Plan that received any significant distribution from Bob's Pension Plan is Thomson – the same employee and trustee of Bob's Pension Plan who was found guilty of breaches of his fiduciary duty. In contrast, Finch, who was required to bring a lawsuit to force Thomson and Bob's to pay proper attention to the administration of the Plan received a reduced pension benefit payment.

The courts decisions below assert Finch suffered no harm. But it cannot be gainsaid that Finch, along with each and every participant of Bob's Pension Plan, received less than what had originally been promised them at retirement. Each certainly received significantly less from the reduction than Thomson. Through use of an illegally adopted Plan Amendment No. 2 and its illegal

reduction of post-1993 accrued benefits, Bob's and Thomson secured a financial windfall.

This Court should use this case to establish the bottom line mandates of ERISA for any pension plan to reduce benefits significantly as required under 29 U.S.C. § 1054(h). This Court should take this case and decide these important issues of federal law and resolve the conflict in analysis between the Ninth Circuit and the Seventh Circuit. Wherefore, Finch respectfully requests that his Petition for Certiorari be granted and that the opinion of the Ninth Circuit Court of Appeals in this case be reversed by this Court.

Respectfully submitted,

RANDALL G. SIMPSON
JERMAIN, DUNNAGAN & OWENS, P.C.
3000 A Street, Suite 300
Anchorage, AK 99503
Telephone: (907) 563-8844
Facsimile: (907) 563-7322

Attorneys for Petitioner
Jack Finch

DATE: December 8, 1999

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK FINCH, Plaintiff-Appellant, v. BOB'S DISTRIBUTING COMPANY, INC. DEFINED BENEFIT PLAN; BOB'S DISTRIBUTING COMPANY, INC.; STANLEY J. THOMPSON; BOB'S DISTRIBUTING CO., INC., DEFINED BENEFIT PLAN FIDUCIARIES, Defendants-Appellees.	No. 98-35221 D.C. No. CV-95-00365-JKS MEMORANDUM[1] (Filed Sep. 10, 1999)

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted August 6, 1999
Anchorage, Alaska

Before: HUG, Chief Judge, TROTT, and TASHIMA, Circuit Judges.

Jack Finch ("Finch") appeals the district court's order denying his motion for partial summary judgment and dismissing his claims against his former employer, Bob's

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts in this circuit except as provided by Ninth Circuit Rule 36-3.

Distributing Company, Inc., ("Bob's"); and Stanley J. Thomson ("Thomson"), trustees for the Bob's Distributing Company, Inc., Defined Benefit Plan ("the Plan") (collectively, "Defendants"). This court has jurisdiction pursuant to 28 U.S.C. § 1291, and we AFFIRM.

1. Amendment Two

Finch first argues that the district court erred in failing to declare Amendment Two ineffective as a matter of law because it violated ERISA's "no cutback" rule and notice requirements, 29 U.S.C. § 1054. We review de novo. *See Spink v. Lockheed Corp.*, 125 F.3d 1257, 1260 (9th Cir. 1997) (holding the interpretation of ERISA is a question of law reviewed de novo). The district court did not err. Section 2.6 of the Benefits Plan empowers the Administrator of the Plan with the authority to "determine all questions arising in connection with the administration, interpretation, and application of the Plan." This includes the authority to reconcile any inconsistences within the Plan. In this case the Administrator reasonably reasonably construed Amendment Two so as to comply with both the statute and the Plan. As to the notice requirement of § 1054(h), we hold that, while the district court correctly found that the Defendants violated this provision, it also correctly held that the lack of prejudice and harm renders any recovery inequitable. *Siles*, 783 F.2d at 930.

2. Statutory Penalties

Second, Finch argues that the district court abused its discretion in refusing to award statutory damages under

29 U.S.C. § 1132. Section 1132 allows the court to assess statutory penalties against the Plan administrator for failure to meet the notice and disclosure requirements under ERISA. Under the circumstances of this case we conclude there was no abuse of discretion.

3. Fiduciary Duties

Finch next argues that the district court erred in refusing to hold Thomson liable for his breaches of fiduciary duty. Under ERISA, fiduciaries are obligated to discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Because all payments appropriately due were paid to the Plan, the district court correctly held that there were no losses the Administrator was required to "make good" to the Plan pursuant to 29 U.S.C. § 1109.

4. Attorneys' Fees

Finally, Finch argues that the district court abused its discretion in denying attorneys' fees under 29 U.S.C. § 1132(g)(1). Again, we review for an abuse of discretion. *Graphic Comms. Union. Dist. Council No. 2 v. GCIU-Employer Retirement Benefit Plan*, 917 F.2d 1184, 1189 (9th Cir. 1990). In this case, the district court properly applied the five-factor test outlined in *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980), to conclude that

neither party should be awarded attorneys' fees. There was no abuse of discretion.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 98-35221
CT/AG#: CV-95-~~00356~~ 00365-JKS

JACK FINCH

Plaintiff-Appellant

v.

BOB'S DISTRIBUTING COMPANY, INC. DEFINED BENEFIT PLAN; BOB'S DISTRIBUTING COMPANY, INC.; STANLEY J. THOMPSON; BOB'S DISTRIBUTING CO., INC., DEFINED BENEFIT PLAN FIDUCIARIES

Defendants-Appellees

(Filed Oct. 7, 1999)

APPEAL FROM the United States District Court for the District of Alaska (Anchorage).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered September 10, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JACK FINCH, Plaintiff vs. BOB'S DISTRIBUTING COMPANY, INC. DEFINED BENEFIT PLAN; BOB'S DISTRIBUTING COMPANY, INC.; STANLEY J. THOMPSON, Defendants.	Case No. A95-0365 CV (JKS) TENTATIVE ORDER (Filed Dec. 22, 1997)

On September 18, 1995, Plaintiff Jack Finch ("Finch") filed a complaint in this Court setting forth six different causes action against the defendants. In Counts I, II and III, Finch alleged various violations in the management of his defined benefit pension plan under the Employee Retirement Income security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* In Counts IV, V and VI, Finch alleged supplemental state law and retaliation claims.

The parties filed a joint status report on October 22, 1997, in which they stated that the case would not be in a posture for trial setting until the Court had an opportunity to rule on all outstanding dispositive motions. *See* Docket No. 62 (joint status report). Briefing is now complete, and there are eight motions ripe for decision. Of the eight motions, four are motions for partial summary judgment filed by the defendants. *See* Docket Nos. 45, 46,

47, 48. Entirely separate and distinct from these four motions, the defendants also move for an order *in limine*, seeking to enforce the settlement agreement reached between the parties in litigation in 1993 before the Alaska Superior Court, Docket No. 49 (motion *in limine*).

Finch filed a motion for summary judgment and declaratory relief against Bob's Distributing Co., Inc., Defined Benefit Plan ("the Plan"). Docket No. 44 (motion). Initially, Finch sought an interim judgment. Thereafter, Finch filed a motion seeking a Rule 54(b) final judgment against the Plan. Docket No. 53 (motion). These two motions address Count II of Finch's complaint. Finch has also filed a cross-motion for partial summary judgment on Counts I and III of his complaint. Docket No. 58 (motion).

In this Tentative Order the Court addresses and provisionally decides all pending motions. The purpose of this Tentative Order is to focus counsel's attention on the factual and legal assumptions which the Court finds persuasive so that if errors have been made, counsel may correct them. A tentative order is not intended to chill or discourage advocacy. The parties will have the opportunity to respond in writing in lieu of oral argument. A final order will be issued after the Court considers the parties' responses.

FACTUAL BACKGROUND

In 1974, Stanley J. Thomson ("Thomson") bought Bob's Distributing Company, Inc. ("Bob's") and became company president and sole stockholder. Aff. of Stanley J. Thomson at ¶ 2. Bob's was a wholesale distributor of

Frito-Lay products, bread and other bakery products in the Anchorage area. *Id.* Bob's continued this business from 1974 until 1997 and opened branch offices in Soldotna and in Fairbanks. *Id.* at ¶ 3. Throughout this entire time, Thomson served as President of Bob's. *Id.*

Bob's hired Finch in 1983 to open the Fairbanks branch and begin delivery of bread products. *Id.* at ¶ 6. Finch drove the Fairbanks route and was the sole employee in Fairbanks until 1991, when Bob's hired another driver for a second route. *Id.* at ¶¶ 6, 12. Drivers were paid an hourly rate, which generally ranged from $10 to $10.50 until the mid-1990's when Bob's phased in a commission system. *Id.* at ¶ 4. Drivers' routes consisted of delivery trips from the warehouse to grocery stores and restaurants, which they made on periodic days throughout the week, depending on the size of the customer and the type of product ordered. *Id.* at ¶ 5.

Bob's operated without any pension plan for its employees until 1990 when Thomson decided that a defined benefit plan would make an attractive and affordable employee benefit. *Id.* at ¶ 23.[1] The installation agreement for the Plan was signed by Thomson as President of Bob's and as Trustee of the Plan. Docket No. 44, Ex. 1 (Installation Agreement). The agreement was

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[1] Prior to installment of the Plan, Bob's had a profit sharing plan which had been set up in the mid-1970's. Thomson was the sole trustee of Bob's profit sharing plan. Docket No. 58, Ex. 2 at 2-10 of 47 (deposition of Thomson). Thomson decided to terminate Bob's profit sharing plan for the purported reason that Bob's was unable to make payments into the plan. *Id.* at 16.

executed on July 30, 1991, with Equitable Insurance Company. *Id.* The Plan's year was set for January 1, 1990, to December 31, 1990. Docket No. 44, Ex. 4 Plan Document).

An actuarial evaluation prepared by Plan actuary Leonard Cargill ("Cargill") showed a minimum funding requirement for the initial Plan year 1990 of $116,120. Docket No. 44, Ex. 5 (Actuarial Valuation of January 1, 1991). In September of 1991, Bob's timely funded the annual payment due for this initial Plan year. Aff. of Stanley J. Thomson at ¶ 27. On December 21, 1991, Thomson signed Plan Amendment No. 1, which was designed to bring the Plan into conformity with safe harbor regulations issued by the Internal Revenue Service ("IRS") following initial adoption of the Plan. Aff. of Marvin B. Speed at ¶ 5. Plan Amendment No. 1 had a stated effective date of January 1, 1991. Aff. of Leonard Cargill at ¶ 5 (Amendment No. 1 attached as Ex. B thereto).

By early 1992, within six months of its initial funding payments, Thomson concluded that Bob's was financially unable to afford the Plan. Aff. of Stanley J. Thomson at ¶ 27. Thereafter, Bob's failed to timely fund the Plan for Plan years 1991, 1992, 1993, 1994 and 1995. Docket No. 44, Exs. 6, 7, 8, 9 (Actuarial Valuations of 1992, 1993, 1994 and 1996)[2] This failure to make minimum funding requirements caused excise taxes, fines and penalties to be assessed by the IRS. Docket No. 44, Exs. 10, 11. Not only was the IRS going to impose a 10% excise tax on failure to make minimum funding requirements, but the IRS also

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[2] Apparently, no actuarial valuation was prepared for the Plan as of January 1, 1995.

proposed to assess a 100% penalty of the funding liability for 1991 and 1992 in the total amount of $506,856.00. Docket No. 44, Ex. 10. In a letter to the IRS. Plan attorney Marvin B. Speed ("Speed") argued for a waiver of the 100% penalty for funding failure in 1991, 1992 and 1993 by asserting that Bob's was financially unable to pay such a tax and adequately fund the Plan. Docket No. 44, Ex. 11.

Bob's subsequently took initial steps toward terminating the Plan, termination to be effective as of April 30, 1993. Docket No. 46 at 4. Bob's notified Plan participants of an upcoming termination. *Id.* Finch received his notices of termination on March 2, 1993, and May 24, 1993. *Id.* The effect of the Plan termination would have been to protect all benefits accrued through the date of termination, but to provide no further benefits. *Id.* Finch claims that the termination notice he received on March 2, 1993, was the first indication that he ever had of the Plan's existence. Docket No. 58, Ex. 25 at ¶ 4 (affidavit of Jack Finch).

On July 16, 1993, Finch sued Bob's in Superior Court for the State of Alaska, alleging unpaid overtime, breach of the covenant of good faith and fair dealing, and failure to properly fund and manage the Plan. *See* Docket No. 49, Ex. A (amended complaint).

In the Fall of 1993, Bob's decided, in lieu of Plan termination, to amend the Plan to minimize ongoing accruals to the minimum amount allowed by law. Aff. of Stanley J. Thomson at ¶ 28. This was memorialized on December 21, 1993, when Thomson signed Amendment No. 2 to the Plan. Docket No. 44, Ex. 22. The effective date by the terms of Amendment No. 2 was January 1,

1993. *Id.* The amendment cut back the accrual rate formula for the promised benefit under the Plan to a benefit level of 2% of average monthly income, thereby reducing Bob's future liability for accrued benefits. *Id.* Finch contends that by virtue of its written effective date of January 1, 1993, the amendment also retroactively reduced accrued benefits of Plan participants for the entire 1993 Plan year. Docket No. 44 at 17. At the earliest, Finch received notice of Amendment No. 2 with his paycheck on January 5, 1994. Docket No. 44, Ex. 23; Aff. of Rhonda Peters at ¶ 5.

Amendment No. 2 was drafted by Plan attorney Speed, in consultation with Plan actuary Cargill. Aff. of Marvin B. Speed at ¶ 13; Aff. of Leonard Cargill at ¶ 9. Speed and Cargill both contend that they intended the effective date stated in Amendment No. 2 to apply only for funding purposes, and the amendment's execution date to apply for purposes of computing the participant's accrued benefits. Aff. of Marvin V. Speed at ¶¶ 12, 14, 16, 17, 19; Aff. of Leonard Cargill at ¶¶ 11-15.

On April 22, 1994, the parties to Finch's state court action attended a settlement conference before Judge Beistline in Fairbanks. Docket No. 49, Ex. C. The parties agreed to settle the case on terms set forth in a handwritten summary. *Id.* The agreement provided: (1) for payment of $120,000 overtime; (2) that Bob's would allow Finch to inspect certain financial statements; (3) for specific limitations on Finch's working overtime; and (4) for a release of all alleged claims, except pension claims. *Id.*

Following the settlement agreement, counsel for Bob's prepared a comprehensive Settlement Agreement

and General Release. Aff. of Stanley J. Thomson, Ex. B. Thomson signed the agreement on May 2, 1994, *Id.* Finch refused to sign the settlement agreement, contending that it did not accurately reflect the terms which had been agreed upon. On June 22, 1994, Finch filed a motion in state court contending that the parties had failed to agree on the terms of the settlement, that further negotiations would not be fruitful, and that the state court should set the case on for trial. Docket No. 49, Ex. D. On September 13, 1994, Bob's filed a motion to enforce the settlement agreement. Docket No. 49, Ex. E. As an "Exhibit J" to the motion, Bob's attached a document stating proposed findings and conclusions. Docket No. 49, Ex. F.

On October 12, 1994, a hearing was held before Judge Beistline in regard to Bob's motion to enforce the settlement agreement. Docket No. 58, Ex. 25 at 34-60 (transcript of hearing on motion to enforce settlement).[3] At that hearing, the parties represented to Judge Beistline that there were "two areas of dispute." *Id.* at 36. The first was a dispute as to whether the language used in the settlement agreement (which was drafted by Bob's attorney) accurately reflected the terms of the agreement reached in Judge Beistline's presence on April 22, 1994. *Id.* at 36-38. Finch's attorney (Ms. Broker) expressed concern that the language used to except Finch's pension claims from the general release was not sufficient. *Id.* Counsel for Bob's (Mr. Arvidson) acknowledged that "one of the claims in the complaint included a pension –

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[3] All page references to this transcript are based upon the exhibit page numbers entered by Finch. That is, "at 37" means at "37 of 60," as Finch referenced the exhibit.

ERISA type claims governed by federal statutes. The parties discussed how to exempt that from the settlement of this dispute." *Id.* at 36-37. Upon being questioned by Judge Beistline as to whether there was still an issue regarding the pension claim, counsel for Bob's responded:

> Yeah, I don't believe there is. I think there was some concern expressed earlier as to whether accounting claims that related to the pension claims were being released, or whether all pension claims were being – being excepted from the settlement. *Defendant is willing to except from the settlement all pension claims, including accounting claims.*

Id. at 38 (emphasis added). After more discussion regarding whether or not the pension issue was settled, the following exchange occurred:

> Ms. Broker: I see the first issue of pension claims divided up into two things, the accounting claims, and this is a distinction that Mr. Arvidson has made, not myself.
>
> The Court: Okay.
>
> Ms. Broker: The accounting claims and the payment claims.
>
> The Court: Okay, what do you mean when you say accounting claims?
>
> Ms. Broker: Well, [as] he defined it in the agreement that he sent to me, the accounting claims were a determination of how much money is owed to Mr. Finch, under the pension.
>
> The Court: Under the pension?

Ms. Broker: Right

The Court: Okay.

Ms. Broker: How much is that? Then there's the payment claims which I take to mean how much is Bob's Distributing owed – or should Bob's Distributing pay into the pension, including costs, attorney's fees, penalties.

The Court: Okay, hold there.

Mr. Arvidson: *Both of those can be excepted from the agreement.*

The Court: Okay.

Mr. Arvidson: *The issue has gone away.*

The Court: *He said that he accepts what you say.*

Ms. Broker: Well, that – I didn't read his agreement that way. The agreement doesn't say that. I mean, if he wants to submit that says everything the way I think it is, we don't have a problem.

The Court: Well, Mr. Arvidson.

Mr. Arvidson: Okay. We thought we had language that would work. We suggested to plaintiff's counsel that if she had language she would prefer, let me know. At this point, we seem to be in a position where we can't get language back and forth on one issue without adding another couple to it, and that's my concern. *I'm stating on the record that the pension claims, be they accounting, be they payment, are not a part of this settlement.*

The Court: Briefly?

Ms. Broker: Done.

The Court: Okay.

Id. at 39-41 (emphasis added).

The second area of dispute articulated before Judge Beistline on October 12, 1994, had to do with whether or not Bob's had satisfied its obligation (under the settlement agreement) to allow Finch to examine the company's financial records. *Id.* at 41-46. Finch was not satisfied by the accounting documents that Bob's made available, and argued before Judge Beistline that Bob's failure to provide him with an accurate accounting amounted to a breach of the settlement agreement. *Id.* at 46-49. Judge Beistline rejected Finch's suggestion that Bob's had breached the settlement agreement, but left open the question of whether the original schedule of payment should be altered in light of Finch's complaints. *Id.* at 51-57. On January 26, 1995, Judge Beistline entered an order confirming settlement, but altering the payment terms. Docket No. 49, Ex. G. On January 18, 1996, Judge Beistline entered final judgment. Docket No. 49, Ex. H.

Finch maintains that shortly after the issuance of Judge Beistline's January 26, 1995 order enforcing the settlement the defendants undertook a pattern of harassment and retaliation against him. Aff. of Jack Finch at ¶ 11. Finch states that his routes, duties and responsibilities were diminished in a manner which reduced his income. *Id.* Finch also states that shortly after diminishing his routes and responsibilities, Bob's converted the method for compensating its drivers from an hourly to a commission basis and reduced his net income by approximately 40%. *Id.* at ¶ 12. In addition, Finch alleges that in

the late Spring of 1995, Bob's undermined a relationship that Finch was developing with a customer, The Co-Op Diner, by refusing to supply him with the product that this customer required. *Id.* at ¶ 13. Finally, as a result of these alleged retaliatory actions, and as these actions began to take a toll on his health, Finch claims that he was forced to resign on July 6, 1995. *Id.* at ¶¶ 15-17. Finch filed the present lawsuit in this Court on September 18, 1995. Docket No. 1 (complaint).

On April 9, 1997, Bob's again moved in state court for an order enforcing the parties' 1994 settlement agreement. Docket No. 49, Ex. I. On August 7, 1997, Judge Beistline entered an order enforcing the settlement agreement. Docket No. 49, Ex. J. In that order, Judge Beistline held that the effective date of the Settlement Agreement and General Release was January 26, 1995. *Id.* Furthermore, Judge Beistline adopted and entered the Findings and Conclusions originally filed by Bob's as "Exhibit J" to its September 13, 1994 motion to enforce the settlement agreement, "except for paragraph No. 3 dealing with pension claims." *Id.*[4]

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[4] The Court has noticed something on this point that neither of the parties have addressed, which could be rather important. Paragraph 3 of the referenced document does not seem to contain any reference to Finch's pension claims. However, paragraph 3 of the Settlement Agreement and General Release deals almost exclusively with release of the pension claims. It appears to the Court that Judge Beistline might have intended to reference paragraph 3 of the Settlement Agreement and General Release, not paragraph 3 of the Findings and Conclusions. In other words, Judge Beistline may have been attempting to reinforce the oral assurances given to him on October 12, 1994, by excepting "paragraph No. 3."

Thereafter, on August 15, 1997, Finch moved for reconsideration of Judge Beistline's order, contending that the effective date of the settlement agreement should be April 22, 1994, not January 26, 1995. Docket No. 65, Ex. A (Finch's motion for reconsideration). Bob's filed a memorandum opposing the motion for reconsideration. Docket No. 65, Ex. C. Upon reconsideration, on September 10, 1997, Judge Beistline confirmed that the effective date of the settlement agreement was January 26, 1995. Docket No. 65, Ex. D.

Bob's has now ceased operations and has no employees. Aff. of Stanley J. Thomson at ¶ 30. The two parts of the business were a distributorship of bread products, doing business as Greatland Foods, and a distributorship of Frito-Lay products, under contract with Frito-Lay. *Id.* In early 1996, Bob's sold the bread distributorship to Greatland Foods, Inc. ("Greatland").[5] *Id.* As a result, many of Bob's employees ceased work for the company and began working for Greatland. *Id.* Termination of their employment triggered the rights of many of the participants to payouts from the Plan. *Id.* As a result, Bob's made up for the underfunding of the Plan, sufficient to pay out the retiring participants as they became entitled to their payments. *Id.*

In late 1996, Frito-Lay advised it would not renew its contract with Bob's, and would take over distribution of its own product. *Id.* at ¶ 31. Most of the remaining Bob's employees transitioned into employment with Frito-Lay. *Id.* The remaining employees who went to work for Frito-

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[5] Greatland appears to be owned by Thomson's son.

Lay also became entitled to their pension payouts. *Id.* at ¶ 32. Frito-Lay bought some assets of Bob's, and Bob's used the proceeds from sale of its assets to Greatland and Frito-Lay to fund the Plan sufficiently to pay pension payments as they became due. *Id.* Among the paid participants was Finch, who received a lump sum payment amounting to $25,000. *Id.* at ¶ 33. The Plan has now paid out all payments "except maybe three or four people who we either have been unable to track down or as to which there has been some issue in figuring out their benefit." *Id.*

DISCUSSION

1. Finch's Supplemental State Law Claims in Counts IV, V and VI

In Counts IV, V and VI of his complaint, Finch alleges that Bob's treated him unfairly in the wake of the state court lawsuit. Specifically, Count IV alleges a violation of the covenant of good faith and fair dealing, Count V alleges retaliation[6] and wrongful constructive discharge, and Count VI alleges infliction of emotional distress.

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[6] Finch has not attempted to make an evidentiary showing of improper retaliation under ERISA. There are no facts to support the conclusion that Bob's constructively discharged Finch with the specific intent of interfering with his ERISA benefits. *See, e.g., Simmons v. Willcox*, 911 F.2d 1077, 1081-82 (5th Cir. 1990). In fact, Finch was fully vested under the Plan. When Finch quit, Bob's did not have the ability to impair his vesting, even if that had been its intent. The Court finds that the retaliation claims are without evidentiary support as to any federal claim and will be disregarded in considering Finch's ERISA causes of action.

Finch complains of a pattern of harassment that involved reducing his customers, routes and authority.

On February 28, 1997, the Court issued a minute order denying without prejudice the defendants' motion to sever Finch's ERISA claims for trial, and to limit the jury trial to non-ERISA matters. *See* Docket No. 37 (minute order). In that minute order, the Court noted that the motion could be renewed if after discovery it became apparent that the ERISA and non-ERISA issues are truly severable. *Id.* The Court has now determined that enough information has been submitted to reconsider the earlier minute order, and concludes that the supplemental state law claims in Counts IV, V and VI are distinct from the ERISA claims and should be dismissed. *See* 28 U.S.C. § 1367(c). Finch may pursue his state law claims in Alaska Superior Court, presumably before Judge Beistline.

United Mine Workers v. Gibbs, 383 U.S. 715 (1966), broadly authorized the federal courts to assert jurisdiction over state law claims when "[t]he state and federal claims . . . derive from a common nucleus of operative fact," the claims are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding," and the federal issues are substantial. *Id.* at 725. As the Supreme Court emphasized in *Carnegie-Mellon University v. Cohill*, 484 U.W. 343 (1988):

> Under *Gibbs*, a federal court should consider and weigh in each case, at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state law claims. When the balance of these factors

> indicates that a case properly belongs in state court, as when the federal claims have dropped out of the lawsuit in its early stages, the federal court should decline the exercise of jurisdiction. . . . As articulated in *Gibbs*, the doctrine of pendent jurisdiction thus is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values.

Id. at 350 (citation and footnote omitted).

The Ninth Circuit Court of Appeals has determined that section 1367 of Title 28, United States Code, retains the basic division, reflected in *Gibbs*, between the power of a court to entertain a pendent claim and the authority of a court, in its discretion, to decline to exercise that power. *Executive Software v. United States Dist. Court*, 24 F.3d 1545, 1555 (9th Cir. 1994). A court can decline to assert supplemental jurisdiction over a pendent claim only if one of the four categories specifically enumerated in section 1367(c) applies. These are:

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). Unless a court properly invokes a section 1367(c) category in exercising its discretion to decline to entertain pendent claims, supplemental jurisdiction must be asserted. *Executive Software*, 24 F.3d at 1556.

The Court has determined that several different factors preclude its exercising supplemental jurisdiction over Finch's pendent state law claims. First, Finch's state law claims present novel issues of state law. It is not clear whether or not Finch should in fact be precluded from relying upon factual events which allegedly transpired during the interim between April 22, 1994, and January 26, 1995. Second, the state law claims preponderate and are totally separate from Finch's ERISA claims. Third, and finally, exceptional circumstances are present in this case. Finch's state law claims closely parallel the claims in his prior state court litigation. Consideration of the state law claims will necessarily involve an evaluation of the settlement agreement that was the product of continuing litigation between the parties. Judge Beistline is clearly in a better position than this Court to evaluate the settlement agreement's impact upon Finch's "subsequent" claims.

Therefore, the Court denies as moot the defendants' motion at Docket No. 48 for partial summary judgment on Counts IV, V and VI. In its discretion, the Court declines to exercise supplemental jurisdiction over Finch's state law claims. Accordingly, Counts IV, V and VI will be dismissed.

2. Bob's Motion to Enforce the Settlement Agreement

Bob's motion *in limine* to enforce the settlement agreement reached in Finch's 1993 state court lawsuit provides a convenient starting point for analyzing the remaining pending motions, for the simple reason that this motion cuts across all of Finch's claims. Docket Nos. 49 (motion), 65 (reply).[7] The motion is opposed. Docket No. 56.

Bob's maintains that Finch is precluded from asserting the ERISA claims alleged in his complaint by virtue of the state court settlement agreement. Bob's argues that Finch had two kinds of ERISA claims: (1) payment claims – the right to benefits; and (2) accounting claims – those claims presented in this action to nullify Amendment No. 2 and to obtain various penalties for failure to give proper notice. Bob's argues that the settlement addressed and resolved the "accounting claims," but excepted any payment claims because the payment claims were not ripe. Thus, Bob's contends that the one and only thing which Finch reserved the right to sue for was payment of benefits under the Plan.

Relying upon the transcript of the October 12 1994, hearing before Judge Beistline, the Court concludes that Finch's ERISA claims are not barred by the state court settlement. In that hearing, counsel for bob's acknowledged that the parties had discussed exempting "pension

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[7] The motion is drafted so as to bar both Finch's ERISA claims and his supplemental state law claims. The extent to which the settlement agreement impacts the state law claims should be decided by the Alaska Superior Court.

– ERISA type claims" from the settlement. Docket No. 58, Ex. 25 at 37. Counsel for Bob's went on to acknowledge Bob's willingness "to except from the settlement all pension claims, including accounting claims." *Id.* at 38. Furthermore, it was made clear that this exception covered questions of "how much . . . should Bob's Distributing pay into the pension, including costs, attorney's fees, penalties." *Id.* at 40. The transcript of this hearing absolutely belies the assertion that the ERISA claims raised in this federal court action were not excepted from the release agreed to in the settlement. The Court concludes that the state court settlement agreement has absolutely no effect on Finch's ability to raise the ERISA claims brought in Counts I, II and III of this action. Accordingly, the Court denies Bob's motion at Docket No. 49 to enforce the settlement agreement.

3. Motions for Partial Summary Judgment on Count I

Defendants Bob's and Thomson move for partial summary judgment dismissing Count I of Finch's complaint. Docket Nos. 45 (motion), 66 (reply). The motion is opposed. Docket No. 58. Finch cross-moves for partial summary judgment on Count I. Docket No. 58 (motion). The cross-motion is opposed. Docket No. 66.

Under ERISA, a plan participant may bring an equitable claim against any plan fiduciary who breaches any of his responsibilities, obligations, or duties. *See* 29 U.S.C. §§ 1104(a), 1109(a). A fiduciary may be subject to the following sanctions: (1) Personal liability to make good plan losses resulting from the breach of duty; (2) Personal liability to restore to the plan any profits he has made

through use of plan assets; (3) Removal from his position as fiduciary; (4) Such other equitable or remedial relief as the court deems appropriate. 29 U.S.C. § 1109(a). ERISA provides a participant with no right to an award of money damages against a plan fiduciary for breach of fiduciary duty. The fiduciary's liability runs to the plan, not to individual participants or beneficiaries. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

Count I of Finch's complaint alleges that Thomson, as Trustee of the Plan, violated his fiduciary duties in several different ways:

> (1) he decreased the formula for accrual of benefits for the participants, including plaintiff, for purposes other than sole and exclusive benefit of participants in the Plan; (2) he failed to require [Bob's] to meet its minimum funding requirements under ERISA and the Internal Revenue Code; (3) he actively concealed such activities and omissions in funding and failed to inform the participants, including plaintiff, of the material modifications and Plan amendments; (4) he failed to inform adequately the participants of their rights under the Plan; and (5) he took all such actions alleged herein to his own benefit or to the other defendants' benefit and to adverse interest of Plan participants.

Docket No. 1 at 7-8 (complaint).[8]

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[8] Count I of Finch's complaint also implicates Bob's, as Plan Administrator. The facts of this case do not support Finch's contention that Bob's somehow breached the fiduciary duties set forth in 29 U.S.C. §§ 1104(a) and 1109(a). The financial decisions of Bob's on funding the Plan were inherently business

The Court concludes that Thomson had a duty as a matter of law to either insure that timely payments were made to the Plan, or to notify Plan participants that such payments were not being made. ERISA places "strict duties" on trustees with respect to the interests of beneficiaries. *Central States, Southeast and Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 575-76 (1985). Section 404(a) of ERISA requires, *inter alia*, that plan fiduciaries discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries, in accordance with plan documents and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1). The Supreme Court has summarized the duties as follows: "The principal statutory duties imposed on the Trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest. *Massachusetts Mut. Life Ins.*, 473 U.S. at 142-43.

It is undisputed that Bob's failed to timely fund the Plan for Plan years 1991, 1992, 1993, 1994 and 1995. This underfunding gave rise to fiduciary duties which Thomson breached by failing to secure adequate funding, or, in

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decisions, unrelated to its role as Plan Administrator. *See Barnes v. Lacy*, 927 F.2d 539 (11th Cir. 1991). The Court therefore grants the defendants' motion at Docket No. 45 to the extent that it seeks partial summary judgment dismissing Count I against Bob's.

the alternative, by failing to notify Plan participants of the underfunding. The Court rejects the defendants' argument that Amendment No. 2 was the "fulfillment" of Thomson's fiduciary obligations. However, this seems to be a wrong without remedy. Thomson and Bob's eventually made up all of the payments to the Plan plus interest. The Plan, the beneficiary of Thomson's fiduciary obligations, ultimately suffered no injury. The fact that any deficiencies were eventually made up distinguishes this case from the situation in *Castaneda v. Baldan*, 961 F. Supp. 1350 (S.D. Cal. 1997), where the deficiencies were never made up and the plan participants were left holding the bag.

Accordingly, the Court grants in part and denies in part Finch's cross-motion for summary judgment on Count I at Docket No. 58. The Court holds that Thomson breached his fiduciary duties by failing to insure that timely payments were made to the Plan, or in the alternative breached his fiduciary duties by failing to notify Plan participants of the Plan's funding deficiencies. The motion is denied, however, to the extent that it seeks partial summary judgment on Count I against Bob's. Similarly, the Court grants in part and denies in part the defendants' motion for partial summary judgment on Count I at Docket No. 45.

However, the Court further holds that the imposition of any remedy would be inappropriate in view of the fact that the Plan's funding deficiencies have been made up. The removal of Thomson as Trustee would be uncalled for and useless. The Plan is nearly paid out, and no one would be willing to serve as Thomson's replacement, particularly without pay and with no Bob's to report to or

functions to fulfill. Denying Thomson what is left of his own pension would benefit no one. There is no need to deter Thomson's behavior, for Bob's is out of business and Thomson clearly has no intention of ever operating another pension plan. Finally, Finch has not presented a convincing general deterrence argument.

4. Motions for Partial Summary Judgment on Count II

In Count II of his complaint, Finch alleges that pursuant to ERISA, 29 U.S.C. § 1054(h), the Plan, Thomson and Bob's were required to give advance notice to Finch of Amendment No. 2. Section 1054(h) requires that pension plan administrators give advanced notice to all participants of any pension plan modifications which significantly reduce the rate of future benefit accruals. Such notice must be provided after adoption of the amendment and at least 15 days prior to the effective date of the amendment. In his prayer for relief, Finch requests that the Court issue a declaratory judgment that the provision in Amendment No. 2 was adopted in violation of ERISA and is therefore void. Docket No. 1 at 16. Finch further requests that the Plan be ordered to pay him the full pension and benefits he would have accrued under the original benefit formula of 3.5% of his average monthly compensation multiplied by the number of his Plan years of service. *Id.*

Three of the pending motions in this case address Count II. First, Finch moves for declaratory judgment against the Plan. Docket Nos. 44 (motion), 61 (reply). Thereafter, in a motion filed approximately two weeks later, Finch moves for an order of final declaratory relief

against the Plan pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Docket Nos. 53 (motion), 61 (reply). Both of Finch's motions are opposed. *See* Docket No. 55. Finally, Bob's and Thomson move for partial summary judgment dismissing Count II. Docket Nos. 46 (motion), 66 (reply). The motion is opposed. Docket No. 58.

At the outset, the Court notes that it would be imprudent to certify any judgment entered against the Plan as final under Rule 54(b). Rule 54(b) provides an exception to the general principle that a final judgment is proper only after the rights and liabilities of all the parties to the action have been adjudicated. *Hogan v. Consolidated Rail Corp.*, 961 F.2d 1021, 1024-25 (2nd Cir. 1992). It empowers the Court to enter a final judgment as to fewer than all of the parties in an action, but "only upon an express determination that there is no just reason for delay." FED R. CIV. P. 54(b). There should be one and only one appeal in this case in which all issues between the parties are addressed. The Court therefore denies Finch's motion at Docket No. 53 for the entry of final judgment against the Plan.

In his motion for declaratory and summary judgment, Finch contends that by virtue of its written effective date, Amendment No. 2 retroactively reduced accrued benefits of Plan participants for the entire 1993 Plan year. This is a source of contention among the parties. As was mentioned in the Factual Background section of this Tentative Order, Amendment No. 2 was drafted by Plan attorney Speed, in consultation with Plan actuary Cargill. Speed and Cargill both maintain that they intended the effective date stated in Amendment No. 2 to

apply only for funding purposes, and the amendment's execution date to apply for purposes of computing the participants' accrued benefits.

ERISA prohibits the reduction of accrued pension benefits by plan amendment, with one specific exception. The prohibition is contained in 29 U.S.C. § 1054(g), which provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in . . . [29 U.S.C. § 1082(c)(8) or 1441]." This is known as the "anti-cutback" rule. The exception referred to in 29 U.S.C. § 1054(g) involves cases where an employer faces a substantial business hardship, waiver of the minimum funding requirements is not available or inadequate, and compliance with the minimum funding requirements would threaten the employer's viability and thus be adverse to the interests of plan participants in the aggregate. *See* 29 U.S.C. §§ 1054(g), 1082(c)(8) and 1083(a). In such cases, ERISA requires express notice to the Secretary of Labor, prior to the effectiveness of a plan amendment reducing accrued benefits. *See* 29 U.S.C. § 1082(c)(8).[9]

The Court concludes that Amendment No. 2 should be construed and interpreted as having only prospective effect. The evidence before the Court clearly points in this direction. First, as ERISA experts, Speed and Cargill were

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[9] Retroactive reduction of accrued pension benefits was also prohibited y the Plan Document. *See* Docket No. 144, Ex. 4. Art. VIII (Plan Amendment), § 8.1(b), (c). Article VIII, § 8.1(b), (c) of the Plan Document essentially adopts the anti-cutback provisions of ERISA and the Internal Revenue Code (26 U.S.C. §§ 411, 412).

fully aware of the anti-cutback rule. Both Amendment Nos. 1 and 2 were executed in December of a year, with a stated effective date as of the first of that year. Yet in describing Amendment No. 1 to Bob's in a November 23, 1993 letter, Cargill stated:

> The benefit formula was changed by an amendment that was executed on 12/20/91. *No amendment may reduce benefits accrued through the date on which the amendment is executed.*

Docket No. 55, Ex. E (emphasis added). Cargill's letter reveals his understanding that the effective date stated in any amendment must be interpreted under and limited by, for purposes of the anti-cutback rule, the execution date.[10] Moreover, in actual practice, no Plan participant's

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[10] The intent of the fiduciaries is also revealed in a correspondence exchanged on May 3, 1994, more than four months after the adoption of Amendment No. 2. Cargill wrote to Bob's that the amendment was adopted only "to reduce the Company's funding commitment" (as opposed to cutting back accrued rights). *See* Docket No. 55, Ex. F at 2. Cargill presented for Thomson's review a Statement of Election describing the effect of Amendment No. 2, which Thomson then signed, and which stated in full:

> In accordance with Internal Revenue Service Code Section 412(c)(8) and the Regulations thereunder, I hereby elect to apply the provisions of the Second Amendment to Bob's Distributing Co., Inc. Defined Benefit Plan, adopted December 21, 1993, *and made retroactively effective to January 1, 1993, for funding purposes* for the Plan Year which began January 1, 1993 and ended December 31, 1993. *This Second Amendment does not reduce the accrued benefit of any plan participant either as of January 1, 1993 or as of the adoption date, December 21, 1993.*

benefits were ever retroactively reduced when computing pension benefits.

A Ninth Circuit case illuminates this point. In *Meagher v. International Ass'n of Machinist and Aerospace Workers Pension Plan*, 856 F.2d 1418 (9th Cir. 1988), *cert. denied*, 490 U.S. 1039 (1989), a plan amendment violated the anti-cutback rule. The district court denied relief to the plaintiff on grounds of the statute of limitations, after concluding that passage of the illegal amendment was the underlying violation which triggered the running of the limitations period. The Court of Appeals reversed:

> We disagree. Meagher was harmed only by the wrongful *application* of the amendment. Only then were his accrued benefits *decreased*. The passage of the amendment was not a violation of ERISA . . .

Id. at 1422 (emphasis in original). The court held that adoption of an amendment which would violate the anti-cutback rule, but which is not then enforced, has no legal effect on participants' rights. *Id.* By the same reasoning, only a wrongful application of Amendment No. 2, to

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Id. at 3 (emphasis added). Finally, the Plan's Form 5500 for calendar year 1993 states:

> *Normal Retirement Benefit*
>
> The Normal Retirement Benefit is 2% of Final Average Compensation multiplied by years of credited service (not in excess of 10) while a participant.
>
> The above formula benefit is payable in the form of a life annuity *and is subject to a minimum benefit that is equal to the benefit accrued through 12/31/93 under the prior plan formula.*

Docket No. 55, Ex. G at 3 (emphasis added).

decrease accrued benefits, would have violated ERISA's anti-cutback rule.

On the other hand, the Court is convinced that Bob's failed to properly notify Plan participants of Amendment No. 2. ERISA prohibits a significant reduction in the rate of future benefit accrual unless prior notice is given to all plan participants. Specifically, 29 U.S.C. § 1054(h)(1) provides:

> A Plan described in paragraph (2) [a defined benefit plan] may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to –
>
> (A) each participant in the plan

It is clear that Amendment No. 2 significantly reduced future benefits. Thus, notice of the amendment should have been provided (1) after adoption of the plan amendment and (2) not less than 15 days before the effective date of the plan amendment. Plan participants were notified of Amendment No. 2 only after its implementation, on approximately January 5, 1994, when they were issued paychecks from Bob's.

Finch argues that all prospective reductions to Plan benefits made pursuant to Amendment No. 2 are unlawful and must be reimbursed. The Court is not convinced. While there was clearly a *de minimis* failure to notify Plan participants of Amendment No. 2, there is no evidence

before the Court indicating that any prejudice was suffered as a result of this failure. Again, the Court relies heavily upon the fact that Amendment No. 2 was given only prospective effect in actual practice. Finch has been represented for more than three years by experienced ERISA counsel. Finch's counsel have had the panoply of not only ERISA rights to obtain information, but also the rights provided by the civil rules of discovery. Yet there is absolutely no evidence of any detrimental reliance or prejudice suffered by Finch as a result of his having received untimely notice of Plan Amendment No. 2. Moreover, Finch could not have taken any steps to improve his position even if he had received timely notice.

Where a pension plan fails to give timely notice of a plan amendment, no employee should lose any opportunity that timely notice would have enabled him to realize. In other words, § 1054(h) requires the opportunity to take advantage of an existing benefit before it is lost. *Davidson v. Canteen Corp.*, 957 F.2d 1404, 1407 (7th Cir. 1992). However, as in this case, where no existing benefits are lost, the failure to provide proper notice is harmless and it would be inappropriate to void the amendment. Further, there is no need for specific or general deterrence. Bob's is no longer in business, and the facts and circumstances of this case simply do not support a general deterrence argument. In sum, the Court finds that any penalty would be a windfall to Finch.

Accordingly, the Court grants in part and denies in part Finch's motion at Docket No. 44 for an interim declaratory judgment against the Plan. The Court holds as a matter of law that Amendment No. 2 was adopted in

violation of 29 U.S.C. § 1054(h). However, the violation did not prejudice Finch to the extent that the Court should intervene and declare Amendment No. 2 void. Similarly, the Court denies Thomson and Bob's motion for partial summary judgment dismissing Count II at Docket No. 46. The Court holds that the defendants violated 29 U.S.C. § 1054(h) in failing to properly notify Plan participants of Amendment No. 2, but the Court declines to impose any penalty against Bob's or Thomson.

5. Motions for Partial Summary Judgment on Count III

Bob's moves for partial summary judgment dismissing Count III of Finch's complaint. Docket Nos. 47 (motion), 66 (reply). The motion is opposed. Docket No. 58. Finch cross-moves for partial summary judgment on Count III. Docket No. 58 (motion). The cross-motion is opposed. Docket No. 66.

In Count III of his complaint, Finch alleges that Bob's, as Plan Administrator, repeatedly, consistently and in bad faith violated the notice and disclosure provisions of ERISA. Finch requests, in his prayer for relief, that Bob's be required to furnish him with copies of all materials that he has requested, that he be awarded statutory penalties of $100 per day commencing thirty days after his initial written request for the documents (on July 7, 1993), and that the Court impose such other penalties on Bob's as it may deem appropriate.

Finch has presented convincing evidence (indeed mostly undisputed evidence) that Bob's repeatedly violated ERISA's notice and disclosure provisions. For

instance, it is undisputed that the first time Finch received a summary plan description ("SPD") was in November or December, 1993. This was over three years after commencement of the Plan. Clearly, this violated the mandate of 29 U.S.C. § 1021(a). *See* 29 U.S.C. §§ 1021, 1022 1024(b)(1)(A). Prior to November 1993, Finch also never received an annual report for the Plan, or a copy of any statement of assets and liabilities and receipts and disbursements, required to be furnished to the participant within 210 days of the close of each fiscal year. *See* 29 U.S.C. §§ 1021, 1023(b)(3)(A) and (B), 1024(b)(3). Finally, it is also clear that Bob's failed to notify Plan participants of its failure to fund the Plan in violation of 29 U.S.C. § 1021(d).[11]

There is some dispute as to whether 29 U.S.C. § 1024(b)(4) was violated. Finch contends that by letter dated July 7, 1993, he requested two things from Bob's: (1) a copy of the Plan, and (2) "information regarding benefits [Finch] has accrued under the Plan." *See* Docket No. 47, Ex. 3. Bob's provided Finch with a copy of the Plan within thirty days, but did not provide Finch with information regarding the benefits he had accrued under the Plan. Bob's maintains that it satisfied Finch's request by timely providing a copy of the Plan. The Court disagrees with Bob's. Bob's was obligated under § 1024(b)(4)

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[11] It is undisputed that Bob's failed to contribute the minimum funding for Plan years 1991, 1992, 1993, 1994 and 1995 before the 60th day following the due date. It is also undisputed that Bob's failed to issue the required notices for failures with respect to Plan years 1991, 1992 and 1993. Consequently, it is undisputed that Bob's violated § 1021(d) at least three times with respect to every participant of the Plan.

to provide Finch with information regarding his accrued benefits. Finch also maintains that § 1024(b)(4) was violated when he received no response to the written requests set out in his letter of January 11, 1994. *See* Docket No. 47, Ex. 18. Bob's argues that this request was not sufficiently specific. Again, the Court agrees with Finch and holds that Bob's violated § 1024(b)(4) in failing to respond to Finch's inquiry of January 11, 1994.

Thus, the Court concludes as a matter of law that bob's violated §§ 1021 and 1024 in each of the ways described above. There are no genuine issues of material fact barring this conclusion. However, the Court further concludes that there is no basis for awarding any penalties under § 1132(c) and (d). This conclusion is drawn in accordance with the reasons outlined in sections 3 and 4 of this Tentative Order. Once again, the Court finds that no one was prejudiced by the dilatory notices.

Penalties are discretionary not automatic. In many cases, prejudice will be suffered but calculation of damages will be difficult. Penalties in such cases serve a function akin to liquidated damages. It is clear that in this case no one sustained a loss as a result of lack of notice. In other cases, a person might be forced to incur litigation expenses as a result of late notice. Lack of notice did not cause increased litigation expenses in this case. Finally, where notice is willfully withheld to obtain a financial advantage, penalties assure that no benefit is gained by wrongful action. There is no evidence that Thomson or Bob's gained anything by delaying notice. The Plan is almost entirely paid out and hence there is no need for individual deterrence, and no suggested basis for general

deterrence since it is unlikely that anyone beyond the immediate parties will hear about this case.

The Court therefore grants in part and denies in part Finch's cross-motion for summary judgment on Count III at Docket No. 58. As a matter of law, the Court holds that (1) Bob's violated the mandate of 29 U.S.C. § 1021(a)(1) by not providing Finch with an SPD within 90 days of the date on which Finch became a participant in the Plan; (2) Bob's violated the mandate of 29 U.S.C. § 1021(a)(2) by not sending an annual report for the Plan, or a copy of any statement of assets and liabilities and receipts and disbursements, required to be furnished to the participant within 210 days of the close of each fiscal year prior to November 1993; (3) Bob's violated § 1021(d) on at least three separate occasions by virtue of its failure to notify participants of the Plan's funding deficiencies in 1991, 1992 and 1993; (4) Bob's violated § 1024(b)(4) in failing to provide information regarding the benefits Finch had accrued under the Plan, in response to Finch's letter dated July 7, 1993; and (5) Bob's violated § 1024(b)(4) in failing to respond to Finch's letter of January 11, 1994. However, the Court rejects Finch's argument that this is an appropriate case for the imposition of penalties under either § 1132(c) or (d). The Court denies Bob's motion for partial summary judgment on Count III at Docket No. 47.

6. Attorney's Fees

The parties have not yet addressed the issue of attorney's fees, but the Court believes that consideration of the issue is now appropriate. ERISA § 502(g), applicable to both trials and appeals, provides that "the court in its

discretion may allow a reasonable attorney's fee and costs . . . to either party." 29 U.S.C. § 1132(g)(1). The following five factors should be considered in deciding whether a grant of attorney's fees is warranted:

> (1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of fees; (3) whether an award of fees against the opposing party would deter others from acting in similar circumstances; (4) whether the party requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Corder v. Howard Johnson & Co., 53 F.3d 225, 231 (9th Cir. 1994) (citing *Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980)).

Weighing these five factors, the Court is not at this time inclined to award attorney's fees to either party. First, while the Plan may have been operated in a rather haphazard fashion, the Court does not believe that anyone operated in bad faith. Second, Bob's is now defunct, the Plan is nearly paid out, and the ability to pay any award of fees is clearly in question. Finally, throughout this Tentative Order, the Court has expressed its opinion that the facts of this case do not support a general or specific deterrence argument. The Court does note, however, that attorney's fees would seem more appropriate than penalties in this case, and requests that the parties address the issue in their responses to this Tentative Order.

CONCLUSION

All of Finch's ERISA claims are decided and eliminated in this Tentative Order. This determination would provide a further ground for dismissing Finch's supplemental state law claims. *See* 28 U.S.C. § 1367(c)(3). However, the Court hereby makes clear that it presently intends to dismiss the supplemental state law claims even if some of Finch's ERISA claims were to go to trial.

The Court requests that the parties respond in writing to this Tentative Order on or before January 21, 1998.

Dated at Anchorage, Alaska, this 22 day of December, 1997

/s/ James K. Singleton
JAMES K. SINGLETON, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JACK FINCH, Plaintiff, vs. BOB'S DISTRIBUTING COMPANY, INC., DEFINED BENEFIT PLAN; BOB'S DISTRIBUTING COMPANY, INC.; STANLEY J. THOMSON; Defendants.	Case No. A95-365 CV (JKS) ORDER DIRECTING ENTRY OF JUDGMENT (Filed Jan. 23, 1998)

Jack Finch ("Finch") sued his former employer, Bob's Distributing Company, Inc. ("Bob's"), seeking damages under state and federal law. This Court entered a tentative order disposing of all claims. *See* Docket No. 71. Specifically, the Court indicated that it would dismiss with prejudice all of Finch's claims brought pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*. The Court also indicated that it would decline supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(c), over Finch's state law claims. The Court anticipated that Finch's state law claims would be referred to Judge Beistline of the Alaska Superior Court for resolution. Judge Beistline had presided over prior litigation between the parties in state court.

The Court's tentative order called for responses from the parties in lieu of oral argument. Both parties filed

responses. *See* Docket Nos. 72 (Bob's response), 73 (Finch's response). The Court has carefully reviewed the parties' responses and sees no reason to modify any of its tentative conclusions. The Clerk is therefore ordered to enter judgment in conformity with the tentative order which is hereby adopted as the final decision of the Court.

Dated at Anchorage, Alaska, this 23rd day of January, 1998.

/s/ James K. Singleton
JAMES K. SINGLETON, JR.
United States District Judge